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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

FRANCIS BYRD,

Petitioner

v.

SEWALL SMITH, WARDEN; ATTORNEY GENERAL
FOR THE STATE OF MARYLAND,

Respondents

Petition for Writ of Certiorari
to the United States Court
of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the conviction of the Petitioner, Francis Byrd, for common law robbery can stand absent any evidence that any item was missing or taken from the alleged victim.

2. Whether the conviction of the Petitioner, Francis Byrd, apparently for murder committed in the perpetration of a robbery can stand absent a conviction for robbery.

PARTIES TO THE PROCEEDINGS

All parties to this proceeding appear in the caption of the decision of the United States Court of Appeals for the Fourth Circuit, which is reprinted in the attached Appendix at A1.

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PETITION FOR WRIT OF CERTIORARI

Francis Byrd, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the decision

of the United States Court of Appeals for the Fourth Circuit entered in the above-captioned case on January 11, 1995. That decision finally denied Petitioner's Petition for a Writ of Habeas Corpus filed originally in the United States District Court for the District of Maryland. The appeal requested, among other things, that Petitioner's conviction for robbery be vacated because the State failed to prove an essential element of the crime, namely whether any property was taken from the victim.

OPINIONS BELOW

The January 11, 1995 opinion of the Court of Appeals which is sought to be reviewed is unpublished and is reprinted in the attached Appendix to this Petition at pages A1 through A21. The decision of the United States District Court for the

District of Maryland entered August 9, 1993 is unpublished and is reprinted in the attached Appendix to this Petition at pages A22 through A26.

JURISDICTION

The Court of Appeals rendered its decision on January 11, 1995. Pursuant to Rule 13 of the Rules of the Supreme Court of the United States, this Petition is being filed within ninety (90) days of the date of the decision. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves § 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

At his trial, the Petitioner was convicted of first degree murder and robbery. Because the evidence on which the conviction was based was insufficient to support a conviction for robbery and because the conviction for murder apparently was based on the wrongful conviction for robbery, the Petitioner filed a Petition requesting that a Writ of Habeas Corpus issue pursuant to 28 U.S.C. §2254. It is from the denial of

this Writ that the instant Petition emanates.

The evidence introduced at trial placed the Petitioner at a second floor apartment in Baltimore City, Maryland in the early morning hours of June 5, 1979. One witness at the trial, Augustine Manley, the apparent paramour of the victim, testified that during the morning in question, the victim had in his possession a red and blue plaid suitcase containing nineteen and one quarter pounds of marijuana. Mrs. Manley testified that she, the victim, the Petitioner and an unknown male were in a second floor apartment and started to walk down the steps to the first floor. The victim was carrying the red and blue plaid suitcase.

Partway down the steps, Mrs. Manley realized that she had forgotten her belt

and went back upstairs. The three men continued walking down the steps and out of her line of sight. At that point, Mrs. Manley heard shots. She ran back into the second floor apartment and eventually made her way to a neighboring apartment.

The only other State witness who testified about events which allegedly took place around the time of the shooting was Daniel Barber, a maintenance man in a nearby building. Mr. Barber testified that he was outside around the time of the shooting and heard shots. Ten to twenty minutes later, he saw two persons running from the scene. Mr. Barber could not tell whether these persons were male or female and could only testify that they were wearing pants. Mr. Barber also testified one person carried a black suitcase. He did

not see the red and blue plaid suitcase which had been in the possession of the victim.

The State also called as a witness Police Officer Robert J. Krajewski. Officer Krajewski testified that he was the first police officer who arrived at the scene of the shooting after it was reported to the police. He also testified about where he discovered the victim's body. However, he offered no testimony related to whether he saw a suitcase near the victim.

At no time did any witness testify that the red and blue plaid suitcase which allegedly contained marijuana and allegedly was in the possession of the victim before his death was missing. Therefore, there is no basis for convicting the Petitioner of robbery of the suitcase.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Court of Appeals warrants review because the issues involved are of significant importance. As set forth herein, the Petitioner was convicted of robbery and first degree murder.

The Petitioner was convicted of robbery notwithstanding the absence of any evidence of asportation, an essential element of the crime. More importantly, his murder conviction emanated from his robbery conviction. As there was no justifiable basis for a conviction of robbery, the conviction for murder can also not stand.

The Petitioner's conviction for both crimes in the absence of supporting evidence is in direct violation of the Petitioner's due process rights as set

forth in the United States Constitution. As such, and as this matter is of paramount importance, the issuance of a Writ of Certiorari is warranted.

I. A CONVICTION FOR A CRIME ABSENT EVIDENCE OF EACH ELEMENT THEREOF VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Petitioner was charged and convicted of robbing the deceased of the suitcase with the marijuana.

> Robbery is the larceny from the person of another by violence. All the elements necessary to constitute larceny are necessary to constitute robbery. One of the elements in larceny is the asportation of the property stolen.

Wiggins v. State, 8 Md. App. 598, 261 A.2d 503, 506 (1970) (citations and footnotes omitted). Similarly,

> [r]obbery is the taking and carrying away of the property from someone else, by force of or threat of force, with the intent to steal the property. In order to convict the defendant of robbery, the State must prove: (1) that the defendant took

> the property from [the victim's] presence and control; . . .

Maryland Pattern Jury Instruction 4:28 (The Maryland State Bar Ass'n. 1987).

Therefore, in order to prove that a robbery occurred, the State must show that property was taken from the victim. This did not occur at the Petitioner's trial.

At the Petitioner's trial, the State did not present any witness to the alleged robbery. Rather, the only testimony related to the alleged robbery was that of Mrs. Manley who stated that when she last saw the victim he was holding a red and blue plaid suitcase containing a considerable sum of marijuana. Mr. Barber testified that he never saw a red and blue plaid suitcase; he only saw a black suitcase. No one testified that the red and blue plaid

suitcase was missing or taken from the victim. Nonetheless, the Petitioner was convicted of robbery of the suitcase.

When considering the Petitioner's request for a Writ of Habeas Corpus, the Court of Appeals skirted this major problem and adopted the argument of the Respondent that it could assume a robbery occurred since the neighbor saw two figures carrying a suitcase. In effect, the State shifted the burden of proof to the Petitioner. Such action has repeatedly been rejected by this Court. *See e.g. Taylor v. Kentucky*, 436 U.S. 478 (1978); *Kirby v. United States*, 174 U.S. 47 (1899). More importantly, this reasoning is in direct conflict with the

due process clause of the United States Constitution.[1]

The Fourteenth Amendment of the United States Constitution prohibits a conviction based on an assumption. U.S. Const., amend. XIV, §1. As set forth by this Court in *Thompson v. Louisville*, 362 U.S. 199 (1960), "just as conviction upon a charge not made would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of guilt." *Id.* at 206. In *Thompson*, the defendant had been convicted of loitering. *Id.* at 200. This Court reversed the conviction noting that if the "evidence fails to prove all three elements of this loitering charge,

---

[1] The Fourteenth Amendment due process rights are applicable to the fifty states. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *See e.g., Nat'l Ass'n. for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958).

the conviction is not supported by evidence, in which event it does not comport with due process of law." *Id.* at 204.

In this case, the State did not prove an essential element of robbery - that property was taken from the victim. This element can not be assumed. As such, because there was no evidence of any asportation of the red and blue plaid suitcase or any other object from the victim, the essential elements of robbery were not proven. Therefore, the Petitioner's robbery conviction cannot be sustained.

It is black letter law that the State must prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime with which he is charged." *Francis v. Franklin*, 471 U.S. 307, 313 (1985). This requirement is a

"bedrock, axiomatic and elementary constitutional principle." *Id.* (citations omitted).

Because the Court of Appeals ignored this principle and allowed the Petitioner's conviction to stand absent all elements of the crime, the Court of Appeals has perpetuated the denial of the Petitioner's due process rights. Because maintenance of these rights is of paramount importance, it is essential that this Court grant the Petitioner's request for a Writ of Certiorari to review this matter.

II. BECAUSE THE CONVICTION FOR MURDER IS OR MAY BE BASED ON THE WRONGFUL CONVICTION FOR ROBBERY, THIS COURT MUST ACT TO PREVENT THE DUE PROCESS RIGHTS OF THE PETITIONER FROM BEING OBLITERATED.

The trial court instructed the jury on both premeditated murder and murder committed in perpetration of a robbery

(felony murder) as potential bases for a conviction for first degree murder. Although the jury convicted the Petitioner of first degree murder, the jury verdict sheet did not specify whether the Petitioner was convicted of premeditated murder or murder committed in perpetuation of a robbery.

Because there is no evidence that the jury found the Petitioner guilty of premeditated murder and because a conviction for murder committed in perpetuation of a robbery cannot stand absent evidence of a robbery, the Petitioner's conviction for first degree murder can not be allowed to stand. This conviction similarly violates the Petitioner's due process rights and mandates this Court's review.

CONCLUSION

Because the Petitioner stands convicted of two crimes without evidence to support either conviction, the Petitioner's due process rights have been violated. Accordingly, this Court must act to protect these rights and grant the Petitioner's request that a Writ of Certiorari be granted.

Respectfully submitted,

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Dated April 10, 1995

APPENDIX

APPENDIX A: OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT .. A1

APPENDIX B: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND..... A22

APPENDIX A: OPINION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Francis Byrd,

Petitioner-Appellant

v. No. 93-5939

SEWALL B. SMITH, WARDEN;
ATTORNEY GENERAL FOR THE
STATE OF MARYLAND

Respondents-Appellees

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-93-1382)

Submitted: December 20, 1994

Decided: January 11, 1995

Before Murnaghan, Hamilton, and Williams Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Andrew Radding, Thomas J. Althauser, BLADES & ROSENFELD, P.A., Baltimore, Maryland, for Appellant. J. Joseph Curran, Jr., Attorney General of Maryland, Annabelle L. Lisic, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellee.

OPINION

PER CURIAM:

Francis Byrd appeals from the district court's order denying relief on his 28 U.S.C. §2254 (1988) petition in which he challenged his 1979 Maryland state court convictions for first degree murder, robbery with a deadly weapon, and use of a handgun in the commission of a crime of violence. Byrd is currently serving a life sentence for the murder conviction along with a concurrent fifteen-year sentence for the handgun offense. At sentencing, his robbery

conviction was merged into the murder conviction.

The following evidence was adduced at Byrd's trial. On the early morning of June 5, 1979, Charles Henson was shot to death in an apartment building at 4002 Oakford Avenue in Baltimore, Maryland. Officer Robert Krajewski testified that he found Henson's body "kneeling with his head up against the basement door and he had what appeared to be a bullet hole in the back of his left ear." Mrs. Augustine Manley testified that early that morning, at approximately 1:00 a.m., she had accompanied Henson (a known drug dealer) to apartment D, on the second floor of 4002 Oakford Avenue, and that they brought with them a red and blue plaid suitcase containing approximately nineteen pounds of marijuana and two and a half ounces of cocaine. Byrd arrived

at the apartment a short time later and purchased $50 worth of cocaine from Manley.[1] A few minutes later, Byrd indicated that he wished to purchase more cocaine but had no more money. According to Manley, Byrd made a telephone call and said afterward that he was "going to go try and get some money so that he could buy some more." Byrd left the apartment.

After thirty-five to forty minutes had passed, Byrd returned to the apartment. Manley testified that he saw Byrd take a gun out from underneath his shirt and show it to Henson and that she then witnessed a conversation between Byrd and Henson, in which Henson tried to persuade Byrd to trade his (Byrd's)

---

[1] Byrd's arrival at the apartment was corroborated by the testimony of Charles Manley, the estranged husband of Augustine Manley, who was outside the apartment and saw Byrd arrive by cab and enter the building.

handgun for more cocaine, but that Byrd refused. At that point, an unidentified man (apparently an acquaintance of Byrd's) arrived at the apartment. Manley then left with Henson, Byrd, and the unidentified man. Henson had the suitcase containing the marijuana; Manley had the cocaine in her pocketbook. The four began descending the stairway with Henson, Byrd, and the third male in front of Manley. Manley testified that Henson was slightly in front of, and in between, the other two men. Manley, however, had forgotten her belt and turned to go back to the apartment to retrieve it. Before she got there, she heard two shots fired from the downstairs hall. She ran into the apartment, without looking back, and locked the door.

Daniel Barber, a maintenance worker, testified that he heard two or three

shots fired at approximately 5:30 a.m. that morning. Barber was behind the building setting out trash at the time. He testified that he came around to the front of the building and saw two men running up the street, one carrying a black suitcase.

Finally, police officer Jessie Ewing testified that he overheard a conversation between Byrd and a female companion in which Byrd said, "I'll be able to beat this charge cause that girl that testified that she picked my picture out down Central Police Station, she won't be able to say that she saw me shoot the man, or shoot that dude, because she had gone upstairs to get her coat." Both Charles and Augustine Manley had identified Byrd from a looseleaf folder containing ninety-one photographs.

After exhausting his state remedies, Byrd filed this federal habeas petition raising the following claims: (1) that there was insufficient evidence to support the robbery conviction; (2) that the prosecutor's remarks during closing argument were unfairly prejudicial; (3) that the prosecution failed to disclose exculpatory material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and (4) that both trial and appellate counsel were ineffective. From the district court's order denying relief on all of his claims, Byrd appeals.

A. *Sufficiency of the evidence.* Byrd claims the evidence was insufficient to support the robbery conviction because there was no testimony that the suitcase containing the marijuana was missing. Moreover, Byrd maintains that Barber testified that the color of the suitcase

he saw carried by one of the two men running from the apartment building was black, whereas Mrs. Manley testified that the suitcase carried by Henson was red and blue plaid.

The standard of review for a claim of insufficiency of the evidence, in a §2254 proceeding, is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Circumstantial as well as direct evidence is considered, and the government is given the benefit of all reasonable inferences from the facts established to those sought to be proven. *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982). In resolving issues of substantial evidence,

this Court does not weigh evidence or review witness credibility. *United States v. Saunders*, 886 F.2d 56, 60 (4th Cir. 1989). Finally, determinations by a state court with respect to historical facts and inferences to be drawn from those facts are entitled to a presumption of correctness on federal habeas review. *Summer v. Mata*, 449 U.S. 539, 546-52 (1981); 28 U.S.C. §2254(d).

In Byrd's second petition requesting post-conviction relief, the Maryland state court found that the evidence presented at his trial was sufficient to support a conviction for robbery. We agree and therefore affirm the district court's holding that the evidence was sufficient for a reasonable jury to have found Byrd guilty of robbery.

B. *Prosecutor's comments during closing argument.* In his closing

argument to the jury, the prosecutor stated that "Charles Henson ... had been executed. He was forced to kneel with his head up against the pad locked basement door." Byrd's attorney objected and a bench conference took place off the record. Afterward, the prosecutor continued his closing argument with this statement:

> As I discuss with you any testimony from the witnesses, I will be discussing with you what I believe that evidence should show to you and what I believe the evidence can infer to you.
>
> A particular point, as an example, I submit that from the fact that Officer Krajewski found this victim kneeling with his head up against the basement door with a bullet hole in the top of his head and another one in the side of his neck, that when you put that evidence together with the autopsy that is in evidence ... that you can infer that Mr. Henson was in that kneeling position with his head up against the wall when he was

> murdered, and from that, ladies and gentlemen, I think that you can infer that there was no question that the person who shot him fully intended to kill Mr. Henson, and the reason that he did that was for the purpose of stealing his nineteen pounds of marijuana worth more than $8,000.
>
> I think that, ladies and gentlemen, from Officer Krajewski's testimony, we can infer that Mr. Henson was forced to kneel in that position and was shot and died almost instantly after he was shot, remained in that position until Officer Krajewski found him and moved him for the purpose of trying to administer first aid to him.

Byrd's attorney did not renew his objection.

Byrd claims that there was no evidence that Henson had been forced to his knees before being shot and that the prosecutor's statements were so prejudicial as to deny him due process. In support of this claim, he included an affidavit from the Deputy Chief Medical

Examiner for the State of Maryland in which she concluded that "it is impossible to say with a reasonable degree of medical certainty that Mr. Henson was on his knees at the time he was shot."

The Maryland state court, in denying Byrd's second petition for post-conviction relief, found that Byrd was not prejudiced by these remarks and, in any event, he had waived this claim by his failure to renew his objection or to ask for a curative instruction. Therefore, this claim is procedurally barred absent a showing of cause and prejudice or actual innocence. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (procedural bar applies when state court has found procedural default regardless of whether it has alternatively discussed merits, as long

as court has explicitly involved state procedural rule as a separate basis for decision).

Byrd cannot show that he was prejudiced because this claim is meritless. It is not enough that prosecutorial remarks are "undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The test is whether they "so infected the trial with unfairness that the resulting conviction is a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). This Court has held that "[w]hether improper argument by government counsel has so prejudiced the trial process as to require reversal must be gauged from the facts of each trial." *Miller v. North Carolina*, 583 F.2d 701, 706 (4th Cir. 1978). Four factors are taken into account in determining whether

improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters. *United States v. Harrison*, 716 F.2d 1050, 1052 (4th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Here, the objectionable remarks were not completely unsupported by the evidence. Although there was no proof that Henson was, in fact, shot while kneeling, such an inference would be permissible given the position in which his body was found and the location of

the bullet wounds. In addition, the prosecutor's comments were isolated and brief; and the trial court sustained Byrd's objection. Moreover, there was sufficient evidence to establish Byrd's guilt, regardless of any statements made by the prosecutor in his closing argument. Finally, as the state court noted, the posture of the victim was irrelevant to the crimes charged and the guilt or innocence of the defendant. Therefore, this claim is without merit.

C. *Failure to disclose Brady evidence*. Byrd claimed that, at his trial, it was first revealed that Charles Manley, who placed Byrd at the crime scene several hours before the murder, was uncertain of his identification. Byrd maintains that Manley's uncertainty as to the identification of Byrd constituted exculpatory evidence which

should have been disclosed under Brady. However, our review of the trial transcript reveals that Byrd's characterization of this testimony as exculpatory is simply not correct. Manley testified that "out of everyone that was in the [photo identification book] that I looked at, out of every picture that I looked at, the picture that I fingered out [of Byrd], was the one that most closely resembled the guy that passed me that night." Therefore, his claim is meritless.

D. *Ineffective assistance claims.* Byrd alleged that his trial attorney was ineffective because he: (1) failed to give any reasons in support of his motion for judgment of acquittal; (2) failed to point out to the jury in his closing argument that the evidence of robbery was insufficient because the state had not

proved that the suitcase was missing; (3) failed to point out in his closing argument that the only two people who could place Byrd at the scene of the crime (Augustine and Charles Manley) were both convicted felons who were at least as likely to have committed the crime; (4) failed to object to the prosecution's "repeated and blatant" mischaracterizations of the testimony of Daniel Barber; and (5) failed to renew his objection to the prosecution's claim that Henson had been forced to his knees and executed. Byrd also alleged that his appellate counsel was ineffective for failing to appeal his conviction based on the insufficiency of the evidence.

To state a claim of ineffective assistance of counsel, Byrd must show: (1) that his attorney's performance fell below an objective standard of

reasonableness and (2) that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668 (1984). None of Byrd's claims meet both prongs of *Strickland*.

Byrd's first claim that his attorney failed to give any reasons in support of his motion for acquittal is unsupported by the record. Byrd's second claim fails for lack of prejudice because the underlying claim (insufficiency of the evidence to support a robbery conviction) is meritless. Byrd's third claim is also meritless. The transcript reveals that his attorney did question both witnesses about their felony convictions. His failure to argue in closing that one of the Manleys committed the crimes was not error because such a claim would have been unsupported by the evidence

introduced during the trial. Therefore, Byrd was not prejudiced.

Byrd's fourth claim regarding his trial attorney's performance is also without merit. During closing argument, the prosecutor stated that Barber had testified that he saw two young black males running up the street. From our review of the trial transcript, this was not an erroneous account of Barber's testimony. The prosecutor also stated that Barber saw a "red and black" suitcase. Barber actually testified that he had seen a "black" suitcase. These were insignificant misstatements by the prosecutor; Byrd's attorney was not ineffective for failing to object to them. In any event, the trial court provided a cautionary instruction to the jury prior to closing arguments:

> In the course of their argument to you, I am sure counsel will be endeavoring to present the evidence to you as accurately as they can, but we are all human and it is possible that things that they tell you may differ from your recollection of the testimony. If that happens, you should rely on your own memory of what you hear and observe.

Therefore, this claim is meritless.

Byrd's final claim of ineffective assistance with respect to his trial attorney was that he failed to object to the prosecutor's claim that the victim had been forced to his knees and executed. Because Byrd's substantive claim on this issue is meritless, this claim fails for lack of prejudice. Similarly, Byrd's claim of ineffective assistance regarding appellate counsel's performance fails for lack of prejudice because the substantive claim

(sufficiency of the evidence) is without merit.

Therefore, we affirm the district court's order denying relief on Byrd's claims. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid in the decisional process.

AFFIRMED

APPENDIX B: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANCIS BYRD, #121749	*	
	*	
v.	*	Civil No.
	*	S93-1282
SEWALL SMITH, WARDEN	*	

* * * * * * *

MEMORANDUM OPINION

This is a petition for relief under the federal habeas corpus statute, 28 U.S.C. §2254, from various convictions entered against Mr. Byrd in 1979 in the Circuit Court for Baltimore City, Maryland. Except as to one aspect of his ineffective assistance claim, the State agrees that Mr. Byrd has exhausted his state remedies, and it does not seek dismissal of the petition as a whole for non-exhaustion. The petition was filed by counsel. No oral argument or hearing is needed. The Court also notes that

there is no provision in the Federal or Local Rules for a responsive pleading to the respondent's answer. Thus, the Court is prepared to rule on the petition.

Upon review of the transcripts and opinions on file, together with the respondent's answer, the Court is of the opinion that Mr. Byrd has shown no constitutional error in his criminal proceedings. Only brief discussion is necessary.

First, the evidence was plainly sufficient for a reasonable jury to have adjudged Mr. Byrd guilty of robbery, albeit that the evidence of robbery was largely circumstantial. See Jackson v. Virginia, 443 U.S. 307 (1979). It follows that there was no error in merging the robbery and first degree murder convictions, as Mr. Byrd also contends, nor was there any

constitutionally-cognizable harm in the form of the jury's verdict on the murder charge.

This Court, next, agrees with the state PCPA judge's conclusion that the prosecutor's remarks, in closing, about the posture of the victim, were not so prejudicial as to deprive Mr. Byrd of due process, even if this claim of error had not been waived. (This Court also agrees that it was waived.)

Next, the Court finds no error involving the identification testimony by Manley. In fact, Manley's testimony cannot be fairly read as showing that there was a second suspect whose identity had been concealed from Mr. Byrd and his counsel.

None of the alleged errors of trial or appellate counsel cited by Mr. Byrd even begins to rise to the level of

professional incompetence required by Strickland v. Washington, 466 U.S. 668 (1984), to justify federal collateral relief.

Finally, it is well-settled that there is no sixth amendment right to effective assistance in the post-conviction petition process.

Thus, a separate order will be entered, denying Mr. Byrd's petition for federal habeas corpus relief, with prejudice.

Dated: August 9th, 1993

Frederic N. Smalkin
U.S. District Judge

ORDER

For the reasons stated in a Memorandum Opinion this date, it is, this 9th day of August, 1993, by the Court, ORDERED and ADJUDGED:

1. That the federal habeas corpus petition of Francis Byrd herein BE, and the same hereby IS, DENIED, with prejudice; and

2. That copies hereof and of the foregoing Memorandum Opinion be mailed by the Clerk to petitioner's counsel and to Maryland Assistant Attorney General Annabelle L. Lisic.

Frederic N. Smalkin
U.S. District Judge